Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

CLIFF GREENE,

Petitioner,

v.

BERGER & MONTAGUE PC; DAVID BERGER, ESQ., Senior Partner; LAWRENCE J. LEDERER, ESQ., Chief of Staff to DAVID BERGER, ESQ.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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76 pp

QUESTIONS PRESENTED

I. Whether the rulings in a case, tried in wrong venue, should be invalidated and, remanded to proper venue, for retrial.

II. Whether a United States District Court, where complaint was filed (EDNY-Brooklyn), and, where summons were issued to be served upon corporate defendants and its officers; have personal jurisdiction of said defendants.

III. Whether New York States' Longarm Statute gives petitioner (a New York resident), personal jurisdiction over defendants mentioned in herein captioned case.

IV. Whether Lower Court (EDNY-Brooklyn), committed prejudicial error when it transferred venue from United States District Court, Eastern District of New York (Brooklyn), to United States District Court, Southern District of New York; based on an old outdated version of 28 U.S.C. Sec. 1391(c) and, an inapplicable 28 U.S.C. Sec. 1406(a), in a bankruptcy proceedings.

V. Whether defendants deprived petitioner of right to make contract pursuant to 42 U.S.C. Sec. 1981.

VI. Whether state law governs federal statute of limitation when federal statutes carries no statute of limitation.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, CLIFF GREENE, pro se, respectfully prays that a Writ of Certiorari issue to review the judgment and Opinion of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

Summary Order of the United States Court of Appeals for the Second Circuit on March 18, 1999 Docket No. 98-7571, and, its denial of petitioner's petition for rehearing on July 28, 1999, is unreported and is printed here at Appendix "A-1", and "G-1". The memorandum and order of the United States District Court for the Eastern District of New York granted Defendant's motion for Transfer of Venue, same is unreported and is reprinted here as Appendix "C-1".

In addition, the District Court's judgment, (SDNY) Amendment XIV to the United States Constitution, opinion and order (96 CIV. 9339) (SHS), also order of The District Court are reprinted here as Appendices "F-1 & F-9" "H-1," respectively. Further, petition for rehearing denied. Second Circuit, DKT No: 96-9620, (Mar. 25, 1997), Appendix "E-1" Petition for rehearing denied. Second Circuit, DKT No: 98-7571 (Jul. 28, 1999), Appendix "G-1".

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit that denied petitioner's petition for rehearing was

entered on July 28, 1999. The Petition for Certiorari was filed within 90 days of that date. This court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment XIV to the United States Constitution is set forth in Appendix "H-1".

42 U.S.C. Sec. 1981.

Sec. 1981. Equal rights under the law.

> All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other.

42 U.S.C. Sec. 1983.

Sec. 1983. Civil action for deprivation of rights.

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory, subject, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Under this section governing civil action for deprivation of rights, Plaintiff can generally sue to enforce federal statutory rights as well constitutional rights. *Boxall v. Sequoia Union High School Dist.*, 464 F. Supp. 1104 (D.C. Cal. 1979).

14 Amend. Sec. 1 notes 3 and 14, makes it crystal clear that persons similarly situated may not be treated differently.

14 Amend., Sec. 1 Note 3 – Equal Protection Clause

Persons similarly situated

> Denial of equal protection may occur when valid law is administered in a manner that unjustly discriminates between similarly situated persons. *See Stone v. Chelan County Sheriff's Dept.*, Wash. 1988, 756 p. 2d, 110 Wash. 2d 806.

Under this section of the 14 Amend. governing civil action for deprivation of rights, plaintiff can generally sue to enforce statutory rights as well as constitutional rights. *See Boxall v. Sequoia Union High School Dist.*, 464 F. Supp. 1104 (D.C. Cal. 1979).

14 Amend., Sec. Note 14 – Equal Protection Clause

Persons similarly situated

In context of allegation that similarly situated persons have been treated differently, substantive due process considerations are virtually coextensive with equal protection guarantees of this amendment. *See Kaufman v. Board of Trustees, Community College Dist. No. 508*, 552 F. Supp. 1142 (D.C. Ill. 1982).

STATE OF NEW YORK, BILL OF RIGHTS

Articles 1, Section II

Art. 1, Sec. II [Equal Protection of Laws; discrimination in civil rights prohibited]. No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion be subject to any discrimination in his civil rights by any other person or by any firm, corporation, or institution or by the State or any agency or subdivision of the state.

Article I, Section 11, Note 11

Essence of the right to equal protection of the laws is that all persons similarly situated be treated alike and that no person or class of persons shall be denied equal protection of the laws which is enjoyed by others in similar circumstances; rule is that equal protection of the laws is not denied when all persons are treated alike under the circumstances and conditions, both in privileges conferred and liabilities imposed. *See Lief v. Hynes*, 98 Misc. 2d 817, 414 N.Y.S. 2d 855 (1979). *See also, People v. Reilly*, 85 Misc. 2d 702, 381 N.Y.S. (1976).

Fed. R. Civ. P. 12(c)

. . . if, on a motion asserting the defense 12(c) Judgment on the Pleadings, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall

be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

District Court, Southern District of New York, (SDNY), Judge Sidney H. Stein, presiding, committed prejudicial error when it failed to give petitioner-plaintiff an opportunity to present to the court, material factual matters outside the pleadings. Failure to do so, violated Rule 56, Fed. R. Civ. P., and due process. Also, 12(c) Fed. R. Civ. P. It has been argued that Local District Court Rule 3 permits judges to dismiss a complaint without a hearing. Petitioner argued that Local Court's Rules do not supersede Fed. R. Civ. P. It is petitioner's understanding that the function of the Court is *not* to resolve disputes between parties – the function of the Court is to determine what issues of fact, if any, are triable. A 12(c) motion may be granted only when there are no sets of issues of facts involved. It is a fact that Defendants deprived Petitioner of Right To Make Contract pursuant to 42 U.S.C. Sec. 1981, and 14 Amendment Equal Protection Clause.

STATEMENT OF THE CASE

Petitioner-appellant's primary cause of action against defendants had to do with defendants' failure to make contract with plaintiff pursuant to 42 U.S.C. Sec. 1981. Petitioner contends that the lower court committed prejudicial error when it granted defendants' 12(c) motion, judgment on the pleadings; knowingly, that 42 U.S.C. Sec. 1981, is a self-standing, independent statute. It is unlike 42 U.S.C. Sec. 1983, which is a state action statute. Section 1981's purpose is to enforce U.S.C.A. Constitutional

Amendment Fourteen (14). *See* 42 U.S.C. Sec. 1981, and Note 12, Ch. 21, below:

42 U.S.C. Sec. 1981.

Sec. 1981. Equal rights under the law.

All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other.

42 U.S.C. Sec. 1981 – Note 12, Ch. 21.

Constitution and statutory civil rights are *for protection of persons against discriminatory legislation or treatment. Mosher v. Beirne*, 357 F.2d 638 (C.A. Mo. 1966). Purpose of this section is to enforce U.S.C.A. Constitution Amendment Fourteen (14). *Davis v. Foreman*, 251 F.2d 421, *certiorari denied*, 78 S. Ct. 1137, 356 U.S. 974, 2 L. Ed. 2d 1148 (C.A. Ill. 1958). *See, also*, Chicago's Last Dept. This is an action in which petitioner-appellant seeks to recover damages against Berger & Montague P.C., a law firm and two of its officers. Names and positions held are mentioned in the above captioned case; please note that they are officers of the law firm, a corporation, and not private attorneys. Petitioner brought this action against the defendants, as a result of having been deprived of the right to make contract pursuant to 42 U.S.C. Sections 1981-1983 and pursuant to 14th Amendment, Section 1

Note 14 – equal protection clause, persons similarly situated. The United States District Court for the Southern District of New York, Sidney H. Stein, trial Judge, granted defendants' 12(c) motion, judgment on the pleadings, same, dismissing petitioner-appellant's complaint and motion in opposition, without a hearing. The opinion and order of the United States District Court for the Southern District of New York, granting of defendant's motion to dismiss pursuant to Fed. R. Civ. P. 12(c) is unreported and submitted herewith as Appendix AP. F-1. In addition, the district court's judgment is submitted herein as Appendix. AP. F-11.

(2) – "Disqualification of justice, judge or magistrate," the trial judge, Sidney H. Stein, should have recused himself from this case; his not doing so, along with his rulings, borders on misconduct. The above mentioned came about as a result of the judge's relationship with a related case before becoming a Judge. Namely, *Greene v. WCI Holdings Corp. et al.*, 956 F. Supp. 509, 511 (S.D.N.Y. 1997). *See* page 2 of Judge Stein's opinion and order, dated March 4, 1998 (96 Civ. 9339 (SHS), under background). For the reasons set forth herein, this court should reverse the lower court's rulings.

REASONS FOR GRANTING THE WRIT

I. THE RULINGS IN A CASE, TRIED IN WRONG VENUE, SHOULD BE INVALIDATED AND, REMANDED TO PROPER VENUE, FOR RETRIAL.

Writ should be granted:

1. Writ should be granted on grounds that the case was tried in wrong venue. 2. Appellant's motion for invalidation of U.S.D.C. Southern District of New York, 12(c) rulings, judgment on the pleadings should be granted on grounds that defendants deprived plaintiff of equal rights under the law pursuant to 42 U.S.C. Secs. 1981 and 1983, civil action for deprivation of rights. 3. Writ should be granted on grounds that the U.S.D.C. Eastern District of New York (Brooklyn) Judge Sterling Johnson Jr., presiding, whose rulings were based on an old, outdated version of a section of a federal statute, namely, 28 U.S.C. Sec. 1391(c), and an inapplicable section of a federal statute namely, 28 U.S.C. Sec. 1406(a), in doing so committed prejudicial error when he transferred venue from E.D.N.Y. to United States District Court, S.D.N.Y., same, based on the above-mentioned statutes and sections.

See In re: Richard W. & Corine B. Lazaro, Debtors (cite, as: 128 B.R. 168) (4) Bankruptcy Key 2082, 51K2082, "statute providing that if case is brought in wrong venue the district court shall dismiss, or in interest of justice, transfer such case to any district in which it could have been brought, *does not govern venue matters in bankruptcy cases. See: 28 U.S.C., Sec. 1406(a).* (Note 133).

Further, also, *see* the following two (2) strong judicial case laws. Same, supports petitioner's position that, a case tried in wrong venue, should be invalidated and, remanded to proper venue, for retrial.

United States of America Appellees v. John Brennan, President and Chief Executive Officer of United States Aviation Underwriters, Inc.; and United States Aviation Underwriters, Inc., Defendants-Appellants, ___ F.3d ___ (Cite as: 1999 WL 459368 (2nd Cir. (N.Y.)

Brown & Williamson Tobacco Corporation, as successor by Merger to the American Tobacco Company, and Liggett Group, Inc., Appellants v. Angela Widdick, as personal representative of The Estate of Roland Maddox, deceased, Appellee, 717 So. 2d 572, 23 Fla. L. Weekly D 1898 (cite as: 717 So. 2d 572.

II. UNITED STATES DISTRICT COURT, WHERE COMPLAINT WAS FILED (E.D.N.Y.-BROOKLYN), AND, WHERE SUMMONS WERE ISSUED TO BE SERVED UPON CORPORATION DEFENDANTS AND ITS OFFICERS; HAVE PERSONAL JURISDICTION OF SAID DEFENDANTS, SAME, PURSUANT TO 1988 AMENDMENT OF 28 U.S.C. SEC. 1391(c).

Writ should be granted on grounds that misconstruction omission, intentionally or unintentionally of 28 U.S.C. Sec. 1391(c), by the three judge panel that heard this case, was prejudicial to petitioner-appellant's cause of action in this matter. 4. Commentary on 1988 and 1990 revisions of Section 1391, by David D. Siegel, and the application of same to defendants Berger and Montague,

P.C. (Law Firm), and its CEO, David Berger, Esq., and his chief of staff, Lawrence J. Lederer, Esq. Pursuant to 1988 and 1990 amendment and revisions of Section 1391, the United States District court that issued summons to be served on defendants Berger and Montague, P.C., its CEO, David Berger, Esq., and his chief of staff, Lawrence J. Lederer, Esq. subjects the defendants to the personal jurisdiction of the court there and hence makes that district: Eastern District of New York, (Brooklyn), a proper venue in plaintiff-appellant's action against Berger and Montague, P.C., a Professional Corporation (Law Firm).

The district court committed reversible error when it ruled that Defendant David Berger, Esq., Chairman, CEO, of Berger and Montague, P.C., a professional corporation (law firm), registered with the New York State Bar Association, licensed to practice law in the State of New York, was not an actor of the State of New York. Lawyers, licensed to practice law in the State of New York must first register with the New York State Bar Association. Once found to be qualified, they are then licensed; also, become an officer of the court. Further, they become actors of the state. Further, they carry on their professional practice and businesses "under the color of state law." They are "sui generis." Their earnings are derived from the power of authority of the state. "Under color" of law has consistently been treated as congruent to the "state action" required under the Fourteenth Amendment.

III. NEW YORK STATE'S LONGARM STATUTE GIVES PETITIONER (A NEW YORK RESIDENT), PERSONAL JURISDICTION OVER DEFENDANTS MENTIONED IN HEREIN CAPTIONED CASE., PURSUANT TO 1988 AMENDMENT OF 28 U.S.C. SEC. 1391(c).

New York State's Longarm Statute gives plaintiff-appellant personal jurisdiction over defendants. Pursuant to 1988 and 1990 amendment and revisions of 28 U.S.C. Sec. 1391, this case was tried in wrong venue. The District Court, E.D.N.Y., committed prejudicial error when it transferred venue to U.S.D.C., S.D.N.Y., based on *old outdated* version of section 1391. Therefore, U.S.D.C., S.D.N.Y., 12(c) rulings, judgments on the pleadings, must be invalidated and, case transferred back to U.S.D.C., E.D.N.Y., for trial by jury as previously demanded. For other reasons for consideration on granting the writ, compare petitioner-appellant's interpretation of 28 U.S.C. Sec. 1391(b) listed below with that of pages 3 and 4 of 2d Cir. order, at AP. A-1. You would find an important omission, re: ("Except as otherwise provided by law.")

STATES' LONGARM STATUTE

28 U.S.C. Sec. 1391(b), provides that "(a) civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law." New York State's longarm statute, as all other states' longarm statutes, has been adopted into 4(e) of Fed. R. Civ. P. This adoption, does indeed, mean proper venue under the federal corporate venue statute. *See* Exhibit -A- page 6 and 7 of

plaintiff-appellant's affidavit in opposition of motion to dismiss appeal, 28 U.S.C. Sec. 1391(b).

Petitioner-Appellant contends that the above mentioned, "Except as otherwise provided by law," Sufficed to mean states' longarm statute and its adoption into 4(e) of Fed. R. Civ. P., thereby making same, indeed, proper venue under the federal corporate-venue statute.

IV. THE LOWER COURT (EDNY-BROOKLYN), COMMITTED PREJUDICIAL ERROR WHEN IT TRANSFERRED VENUE FROM UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK (BROOKLYN), TO UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK; BASED ON AN OLD OUT-DATED VERSION OF 28 U.S.C. SEC. 1391(c). AND, AN INAPPLICABLE 28 U.S.C. SEC. 1406(a), IN A BANKRUPTCY PROCEEDING.

The United States District court, Eastern District of New York (U.S.D.C., E.D.N.Y.) committed prejudicial error when it ruled on page three (3) of its memorandum and order, dated Nov. 12, 1996 – Re: 95 CV 4897 (SJ), "That pursuant to 28 U.S.C. Sec. 1391(b)(2); was the applicable Judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of the property that is the subject of the action is situated." Therefore, venue should be transferred from U.S.D.C., E.D.N.Y. to U.S.D.C., S.D.N.Y.

Nothing is further from the truth. The above mentioned court's rulings were erroneous and had no basis in fact or law. Further, the rulings were an abuse of Judicial discretion. *See A. Olinick & Sons v. Dempster Bros.*, 365 F.2d

439, 444 (2d Cir. 1966), which governs civil actions where jurisdiction is not founded solely on diversity of citizenship.

The true facts are that the above mentioned substantial events or omissions took place not in U.S.D.C., S.D.N.Y., but, instead in the United States District court (U.S.D.C.), Central District court of California (C.D.C.C.), at Drexel Burnham Lambert, Inc., "high yield bond department," Beverly Hills Office, Los Angeles, California. *See* Chapter 11 Case No. 90 B 10421 (FGC), Re: Debtors Disclosure statement pursuant to section 1125 of the Bankruptcy Code. Page 24, B. *Business Conducted by Drexel, 1. Investment Banking. See* as Follows:

> "The Drexel High Yield and convertible Bond Department (The High Yield Bond Department) was responsible for the sale and trading of high yield debt, preferred stock and convertible securities. The high yield Bond Department, which was headed by Michael R. Milken until 1989, accounted for a substantial portion of Net Income of Drexel during the 1980's." Further, *see*, U.S.D.C., C.D.C.C., Master File No. CV-88-6142-WPG stipulation of settlement, *class action* Securities and Exchange Commission, litigation release No. 12061/April 13, 1989, Re: *Securities and Exchange Commission v. Drexel Burnham Lambert, Inc., Drexel Burnham Lambert Group, Inc., et al.*, 88 Civ. 6209 (MP) (S.D.N.Y.), for affirmation.

28 U.S.C. Sec. 1391(c).

IF ONE OR MORE DEFENDANTS IS A CORPORATION

28 U.S.C. Sec. 1391(c), Provides that "(a) corporation may be sued in any judicial district in which it is incorporated or licensed to do business, or is doing business, such judicial district shall be regarded as the residence of such corporation for venue purposes."

COMMENTARY ON 1988 AND 1990 REVISIONS OF SECTION 1391 BY DAVID D. SIEGEL

Section 1391 is big business in the Federal courts. It's the basic venue statute, determining what district or districts an action may be brought in. Extensive changes were made in the section in 1988 and 1990, affecting Subdivisions (a), (b), (c) and (e).

SUBDIVISION (c)

BACKGROUND OF 1988 AMENDMENT

The old subdivision (c) allowed venue in an action against a corporate defendant to be laid in the corporation's district of incorporation or in any district in which it was licensed to do business or actually doing business. The view on which congress acted in amending the subdivision (c), the provision governing the venue of actions against corporations, was amended in 1988 in the judicial improvements and access to Justice Act (Pub.L. 100-702). The aim was apparently to restrict the plaintiff's venue choices somewhat, but in some cases it may have the opposite effect.

Turning now to the new subdivision (c) and its fresh approach, application to defendant corporation. *See* below.

APPLICATION TO DEFENDANT CORPORATION

Turning attention now to the residence of the corporate defendant to which subdivision (c) is exclusively addressed, we assume through all of the ensuing discussion that the action is brought against a corporation.

It should be noted as a preliminary that the subdivision (c) *test of* a corporate defendant's residence applies only when the plaintiff has opted to lay venue in the defendant's district of residence, which the plaintiff can do either in a diversity case under subdivision (a) of section 1391 or in any other kind of case under subdivision (b).

Subdivision (c) now provides that the corporation is to be deemed a resident of any judicial district in which "it is subject to personal jurisdiction at the time the action is commenced". This means that anything that would make the corporation amenable to jurisdiction in that district, or permit extra-territorial service of the court's summons under any of several well-known tests would ipso facto make that district a proper venue as well.

See Appendix I-1, same, attached hereto, for the complete seven (7) pages of this commentary on 1988 and 1990 revisions of section 1391, by David D. Siegel.

Petitioner respectfully requests that the Court keep in mind that defendant Berger & Montague, P.C. is a professional corporation. (*See* Appendix I-1 – for affirmation of

the above. And further detail, as same, relates to Defendant Berger & Montague, P.C. This court, should grant the writ, because the instant court's decision is in conflict with six strong lines of authority. The six lines of authority are as follows:

> 1. 28 U.S.C. Sec. 1391(c) Amend. 1988-1990. 2. New York State's Longarm Statute 3. 28 U.S.C. Sec. 1406(a), As same, relates to transfer of venue in bankruptcy cases. 4. 28 U.S.C. Sec. 1404(a), Re: *Landmark Land Co., et al. v. OTS.* (cite as: 984 F.2d 910). 5. *United States of America, Appellees v. John Brennan, President and Chief Executive Officer of United States Aviation Underwriters, Inc.;* And *United States Aviation Underwriters, Inc., Defendant-Appellants.* F.3d (cite as: 1999 WL 459368 (2d Cir. [N.Y.]. 6. *Brown and Williamson Tobacco Corporation, as successor by merger to the American Tobacco Company, and Liggett Group, Inc., Appellants v. Angela Widdick, as personal representative of the Estate of Roland Maddox, Deceased, Appellee,* 717 So.2d 572 23 Fla.L.Weekly D 1898 (cite as: 717 So.2d 572).

The trial judge, relied upon the pre-1988 amendment of section 1391(c) version of the statute in the transfer of venue from U.S.D.C., Eastern District (Brooklyn), in so doing, committed prejudicial error. Same, in the use of 28 U.S.C. Sec. 1406(a) *see* as follows: *In Re: Richard W. & Corine B. Lazaro,* Debtors (cite as: 128 B. R. 168) (4) bankruptcy key 2082, 51K2082, "statute providing that if case is brought in wrong venue the district court shall dismiss, or in interest of justice, transfer such case to any district in which it could have been brought, *does not govern venue matters in bankruptcy cases, see 28 U.S.C. Sec. 1406(a).*

V. DEFENDANTS DEPRIVED PETITIONER OF RIGHT TO MAKE CONTRACT PURSUANT TO 42 U.S.C. SEC. 1981.

This case has to do with defendants depriving plaintiff of right to make contract pursuant to 42 U.S.C. Sec. 1981. Further, it has to do with racial discrimination, violation of plaintiff's fundamental constitutional and statutory rights (federal and state). Plaintiff requested legal representation of Berger & Montague, P.C., et al., pursuant to 42 U.S.C. Sec. 1981, he was denied representation on the grounds that Berger & Montague, P.C., Senior Partner, David Berger, Esq., held a co-chairmanship on the court appointed subclass B executive committee and co-counsel to subclass B claimants. Therefore, it would be unethical, illegal and a conflict of interest for Berger & Montague, P.C. to represent plaintiff as a client in the Drexel Burnham Lambert, Inc. ("Drexel"), bankruptcy case. However, Berger & Montague, P.C., made contract with others who were white; and represented them in the Drexel, Michael Milken, Boesky and others wrongdoing and denied plaintiff right to make contract pursuant to 42 U.S.C. Sec. 1981, and representation in Drexel, Michael Milken, Boesky and others wrongdoing because plaintiff is a black, an African American and, in so doing, violated plaintiff's constitutional and statutory rights. Defendants deprived plaintiff of right to make contract pursuant to 42 U.S.C. Sec. 1981, 42 U.S.C. Sec. 1983, 14 Amend., State of New York Bill of Rights, Article I, Sec. II, Note II, Article 4, Sec. 40-c, Note 6.

ARTICLE 1, SECTION II, NOTE II

Essence of the right to equal protection of the laws is that all persons similarly situated be treated alike and that no person or class of persons shall be denied equal protection of the laws which is enjoyed by others in similar circumstances; rule is that equal protection of the laws is not denied when all persons are treated alike under the circumstances and conditions, both in privileges conferred and liabilities imposed. *See Lief v. Hynes,* 98 Misc. 2d 817, 414 N.Y.S. 2d 855 (1979). *See also, People v. Reilly,* 85 Misc. 2d 702, 381 N.Y.S. 2d 732 (1976).

ARTICLE 4, SEC. 40-C, NOTE 6

Note 6, Direct or Indirect Discrimination

Discrimination against any person by reason of race, color or religion is barred under this section either by direct or indirect means. *See Camp-of-the Pines v. New York Times Co.,* 184 Misc. 389, 53 N.Y.S. 2d 475 (1945). Plaintiff contends that justice was not served in this case. Therefore, petitioner respectfully requests that this Court restore the constitutional and statutory rights plaintiff has been deprived of by the defendants. One's constitutional and statutory rights may not be diminished or restrained by denial of privilege granted by law or regulation. *See Smart v. Avery,* 370 F.2d 788 (C.A. Tenn. 1967). Also, *see Boxall v. Sequoia Union High School Dist.,* 464 F. Supp. 1104 (D.C. Cal. 1979). Defendants knew on June 24, 1992, the date of the above mentioned conference, that Berger & Montague, P.C., were representing clients, who were of the white race; in Drexel's bankruptcy proceedings, but *concealed* same, from plaintiff. Defendant's memorandum of law in support of defendants' motion to

transfer venue to the Southern District of New York, same, dated: New York, New York, January 22, 1996, on Page 7, Subdivision (b) "defendnts had already represented clients and another class whose claim directly competed with Mr. Greene's." Also, *see* page 2 of Judge Johnson's Memorandum and order at AP. C-1.

The Court, can clearly see from the above quote, that the reason for depriving plaintiff of right to make contract, pursuant to 42 U.S.C. Sec. 1981, on June 24, 1992, (longer than 3½ years) has changed. 42 U.S.C. Sec. 1981, makes no provisions, exemptions or options. It simply states that if contract is made with members of the white race, and a black comes along who is similarly situated, then contract must be made with the black. You may not deprive the black of right to make contract based on race. *See* 14 Amend. Sec. 1, Notes 3 and 14. Also, *see* New York State Bill of Rights, which is identical to that of equal protection clause of 14 Amend. Plaintiff held Wickes Companies Inc., Securities as in *In re Ivan F. Boesky Securities, Litigation*, MDL DKT. No. 732, M21-45-MP (S.D.N.Y.). The very same securities defendants' clients held who shared in the $26,000,000 award listed on page 17 of Evaluation Schedule, *see* Exhibit-H(a) of the complaint and AP. 12 for affirmation. The question is, how then, could plaintiff's securities compete with those of defendants' clients' securities as mentioned herein above; when they are the same?

Defendants could have petitioned the court to include plaintiff into the class of its clients, since he held the very same securities. The federal rules of civil procedure require simple notice pleading. This is because fairness and not excessive technicality is the guiding

principle under the federal rules of civil procedure. *Gordon v. National Youth Work Alliance,* 675 F.2d 356 (D.C. Civ. 1982). Fed. R. Civ. P. 12(c).

Motion for judgment on the pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. Plaintiff-Appellant complaint and motion in opposition to dismiss pursuant to 12(c) Fed. R. Civ. P. was dismissed by the district court without an opportunity to be heard and to present additional evidence in support of plaintiff's claims for relief. Under the mandatory phrasing of Federal Rules 12(b) and 12(c), the court's failure to provide a fair procedure for submission of affidavits, and other factual material, was indeed prejudicial error, at least, reversible error. Further, pursuant to Rule 56, Fed. R. Civ. P., a trial judge does not have the authority to grant a 12(c) motion without a hearing. Courts are required to treat 12(c) motions as one for summary judgment. Petitioner-appellant contends that it is unconstitutional to dismiss a complaint without a hearing. It deprives plaintiff of a basic fundamental constitutional right, due process. Plaintiff's complaint was dismissed without a hearing. What a travesty of justice. *See Dolese v. United States* 100 S. Ct. 1647. Also, *see LaChance v. Erickson,* cite as 118 S. Ct. 753 (1998). "The core of due process is the right to notice, and a meaningful

opportunity to be heard" wrote Chief Justice William Rehnquist in the court's terse opinion, re: "No constitutional right to lie" (N.Y. Times, Editorial, page A14, January 24, 1998)" *Rehnquist, C.J.*, delivered the opinion for a unanimous court. The district court, committed prejudicial error when it granted defendant's 12(c) motion, judgment on the pleadings, knowing that pursuant to 42 U.S.C. Sec. 1981, defendants were in violation of same.

42 U.S.C. Sec. 1983 Note 411 ch. 21

Plaintiff's claim under both sections 1981 of this title which grants equal rights and this section which provides for civil actions based on deprivations of those rights must be grounded on violation of right of substance, and not merely on theoretical speculation that some right has been infringed. *Homes v. Finny*, 631 F.2d 154 (C.A. Kan. 1980). Under this section governing civil action for deprivation of rights, a plaintiff can generally sue to enforce Federal statutory rights as well as Constitutional rights. *Boxall v. Sequoia Union High School Dist.*, 464 F. Supp. 1104 (D.C. Cal. 1979). The district court, committed reversible error when it granted defendant's 12(c) motion, judgment on the pleadings. Knowing that it is unconstitutional to treat persons that are similarly situated differently.

VI. STATE LAW GOVERNS FEDERAL STATUTE OF LIMITATIONS WHEN FEDERAL STATUTES CARRIES NO STATUTE OF LIMITATION.

The district court committed prejudicial error when it relied upon CPLR Sec. 214:5 as opposed to CPLR Sec.

213:1.2, and 8, in its rulings determining statute of limitation pursuant to 42 U.S.C. Sec. 1988. Constructive Fraud – (Note 250) N.Y.S. CPLR, Sec. 213(1).

A. Concealment – (Note 245), B. False representation – (Note 252), C. Plaintiff pleaded fraud with the particularity required by Rule 9(b) Fed. R. Civ. P. Defendants depriving plaintiff of right to make contract pursuant to 42 U.S.C. Sec. 1981; and reasons given for doing so, as mentioned herein, constitute the following: 1. Constructive fraud, 2. False representations, 3. Concealment, Pursuant to CPLR Section 213(1) each of which is subject to six year actions, *See In Re: Ahead by a Length, Inc.*, 100 B.R. 157 (Bkrtcy. S.D.N.Y. 1989); *Finn v. Empire Trust Co.*, 121 F. Supp. 309 (D.C.N.Y. 1950); *Buttles v. Smith*, 281 N.Y. 226, 22 N.E. 2d 350 (1939). In *509 Sixth Ave. Corp. v. New York City Transit Authority*, 15 N.Y.S. 2d 89, 203 N.E. 2d 486 (1964). In *McCabe v. Gelfard*, 57 Misc. 2d 12, 291 N.Y.S. 2d 261 (1968). Rule 9(b) Fed. R. Civ. P. has been satisfied. Pursuant to CPLR Sec. 213:1, an action for which no limitation is specifically prescribed by law; must be commenced within six years. The action in the instant case, commenced in June 1992. Complaint filed in court on November 29, 1995. Pursuant to 42 U.S.C. Sec. 1988, the statute of limitations for claims brought pursuant to sections 1981 and 1983 are governed by state law. Courts presented with sections 1981 and 1983 claims must look to the statute of limitations governing the most closely analogous state cause of action. *See Owens v. Okure*, 488 U.S. 235, 239, 109 S. Ct. 573, 102 L. Ed. 2d 594 (1989). Petitioner-Appellant contends that CPLR Sec. 213:2, an action upon a contractual obligation or liability, is the most closely analogous state cause of action in plaintiff's (instant) case. Why? Because defendant-appellees have a

federal statutory obligation or liability pursuant to 42 U.S.C. Sec. 1981 to make contract with plaintiff, an African American, since plaintiff is similarly situated to members of the white race of which defendants made contract for legal representation in the Drexel Burnham Lambert, Inc. Bankruptcy proceedings. Defendant-appellees and the district court relied in CPLR Sec. 214:5, which has to do with "action for personal injury," 214:5 goes on to "when cause of action accrues" . . . "in negligence and strict products liability claims, injury is the gist of the wrong. Accordingly, the statute of limitations does not begin to run until there has been a physical injury to the plaintiff." CPLR Sec. 214:5, has a three (3) year statute of limitation. Whereas CPLR Sec. 213:1, has six (6) year statute of limitation. Plaintiff contends that CPLR 213:1, is the applicable CPLR for the instant case. *See* page 6, under II, *Statutory Civil Rights Claims,* for district court rulings on the herein above mentioned subject matter.

Trial Judge has no authority to grant summary judgment where no hearing was held on motion. *See Dolese v. United States,* 541 F.2d 853 (1976, CA 10 Okla.), 76-2 USTC par. 9635,38 AFTR 2d 76-5769, later App. 605 F.2d 1146 (CA 10 Okla.), 79-2USTC par. 9540, 44 AFTR 2d 79-5552, *reh. den.* 80-2 USSTC par. 9731, 44 AFTR 2d 79-5724 2nd *cert. den.* 445 U.S. 961, 64 L. Ed. 2d 236, 100 S. Ct. 1647 (CA 10 Okla.).

CONSTITUTIONAL LAW

Core of due process is right to notice and a meaningful opportunity to be heard. *See* U.S.C.A. Const. Amend. 5

and 14. Petitioner has been deprived of this cherished constitutional right. Petitioner further contends that it was unconstitutional for the lower court to dismiss plaintiff's complaint without a hearing. It deprived plaintiff of a basic fundamental constitutional right, due process. Repeat, "The core of due process is the right to notice, and a meaningful opportunity to be heard" wrote Chief Justice William Rehnquist in the court's terse opinion, re: "No Constitutional right to lie" (N.Y. Times Editorial, page A14, January 24, 1998). *See LaChance v. Erickson,* cite as 118 S. Ct. 753 (1998), No. 96-1395, argued Dec. 2, 1997, decided Jan. 21, 1998.

Fairness of Justice – Amend. 14, Sec. 1 Note 64

Due process is not measured by the yardstick of personal reaction or the sphygmogram of the most sensitive person, but by the whole community sense of decency and fairness that has been woven by common experience into the fabric of acceptable conduct. *Breithaupt v. Abram,* 77 S. Ct. 408, 352 U.S. 432, 1 L. Ed. 2d 448 (1957).

PREJUDICIAL ERROR

Error substantially affecting appellant's legal rights and obligations. *See Erskine v. Upham,* 56 Cal. App. 2d 235, 132 P.2d 219, 228 (1942). Such may be grounds for new trial and reversal of judgment. *See* Fed. R. Civ. P. 59. A prejudicial error is one which affects or presumptively affects the final results of the trial. *See State v. Gilcrist,* 15 Wash. App. 893, 552 P.2d 690, 693 (1976). *Trepainer v.*

Standard Min. & Mill. Co., 58 Wyo. 29, 123 P.2d 378, 380 (1942). *See also* error; Plain Error Rule. The above-mentioned prejudicial error is in reference to lower court's Rule 56, Fed. R. Civ. P. and 12(c) violation.

RULES OF THE SUPREME COURT

RULE 10

Petitioner respectfully requests that a writ of certiorari be granted pursuant to Rules 10(a) and (c) re: Second Circuit Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings, and sanctioned such a department by the U.S. District Court Eastern District of New York as to call for an exercise of U.S. Supreme Court power of supervision re: herein mentioned Rule 56, Fed. R. Civ. P. and 28 U.S.C. Sec. 1391(c), Rule 10(c), Second Circuit Court of Appeals, has decided a federal question in a way that conflicts with applicable decision of the U.S. Supreme Court. *See Dolese v. United States*, 100 S. Ct. 1647 re: above-mentioned Rule 56, Fed. R. Civ. P. and 28 U.S.C. Sec. 1406(a) as same related to transfer of venue in bankruptcy cases.

28 U.S.C. Sec. 1651(a)

The petitioner prays that this Court, the highest in our country *make the wrong in this case right.* Then justice would have prevailed. This Court has the authority to do just that. *See* 28 U.S.C. Sec. 1651(a).

CONCLUSION

For the reasons set forth above a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals in this matter.[1]

Dated: December 29, 1999

Respectfully Submitted,

CLIFF GREENE, *pro se*
1333 President Street
Brooklyn, New York 11213
(718) 493-7028

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[1] If this court elects not to address the issues presented in this writ at present time, it is requested that the writ issue and that the matter be remanded to the Court of Appeals for redetermination in light of this court's opinions in *Murray, supra* and *Sequram, supra.*

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED to THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 18th day of March, one thousand nine hundred and ninety-nine.

PRESENT:

HON. RICHARD J. CARDAMONE,
HON. CHESTER J. STRAUB,
HON. DAMON J. KEITH,*
Circuit Judges.

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* The Honorable Damon J. Keith, of the United States Court of Appeals for the Sixth Circuit, sitting by designation.

CLIFF GREENE,

Plaintiff-Appellant,

v.

BERGER & MONTAGUE, P.C.; DAVID BERGER, Esq., Senior Partner; LAWRENCE J. LEDERER, Esq., Chief of Staff to David Berger, Esq.,

Defendants-Appellees.

SUMMARY ORDER
No. 98-7571

(Filed March 18, 1999)

Appearing for Appellant:
CLIFF GREENE, *Pro Se*, Brooklyn, NY.

Appearing for Appellee:
BRENDA F. SZYDLO, James J. Sabella, Cathleen M. Tiernan, Brown & Wood, New York, NY.

Appeal from a judgment entered in the United States District Court for the Southern District of New York (Sidney H. Stein, *Judge*).

AFTER ARGUMENT AND UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court is hereby AFFIRMED.

Cliff Greene, *pro se* and fee paid, appeals from a judgment of the District Court for the Southern District of New York (Sidney H. Stein, *Judge*), granting the defendants' motion for judgment on the pleadings, pursuant to

Federal Rule of Civil Procedure 12(c), and dismissing Mr. Greene's civil rights complaint.

In his brief, Mr. Greene raises, *inter alia*, the following arguments: 1) the District Court erroneously granted the defendants' Rule 12(c) motion; 2) the District Court erroneously granted judgment on the pleadings without holding a hearing; 3) Judge stein should have recused himself from presiding over Mr. Greene's case because, prior to becoming a federal judge, Judge Stein was a senior partner in a law firm that represented "[a] hostile adversary of [Mr. Greene's] in a related case."

Mr. Greene also moves (1) to amend his brief and appendix, (2) for "invalidation of [the] court's 12(c) rulings and judgment on the pleadings," and (3) to add newly discovered evidence to his appendix. Mr. Greene's first motion seeks, at least in part, to add an argument that the Eastern District of New York (Sterling Johnson, Jr., *Judge*) erroneously transferred his case to the Southern District of New York.

I. Motions and Venue Transfer

Mr. Greene's motions are denied in their entirety, except that the motion to amend his brief and appendix is granted to the limited extent that it seeks to amend Mr. Greene's brief to incorporate an argument that the Eastern District erroneously transferred the action to the Southern District.

However, Mr. Greene's venue transfer argument is without merit. A district court's transfer of a case on venue grounds is reviewed for abuse of discretion. *See A.*

Olinick & Sons v. Dempster Bros., 365 F.2d 439, 444 (2d Cir. 1966). Under 28 U.S.C. § 1391(b), which governs civil actions where jurisdiction is not founded solely on diversity of citizenship, venue is proper in:

> (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of the property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

Under 28 U.S.C. § 1406, "[t]he district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

In this case, venue was proper in the Southern District but not the Eastern District. As the District Court noted, the defendants reside in different states, and it is not the case that "a substantial part of the events" of which Mr. Greene complained took place in the Eastern District. However, "a substantial part of the events" giving rise to Mr. Greene's claim – namely the defendants' failure to represent him in the Drexel action and the improper valuation of his claim – occurred in the Southern District where the Drexel action was pending. Accordingly, the action was properly transferred.

II. The Order and Judgment of Dismissal

The District Court's grant of judgment on the pleadings for the defendants was proper. We review *de novo* a district court's Rule 12(c) dismissal of a complaint. *See Sheppard v. Beerman*, 94 F.3d 823, 827 (2d Cir. 1996). When ruling on such a motion, "[a]ll allegations in the complaint must be accepted as true; all inferences must be drawn in favor of the plaintiff; and dismissal is proper only when it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* (internal quotation marks omitted).

Upon thorough review, the District Court's grant of the Rule 12 motion is affirmed substantially for the reasons stated by Judge Stein in his order dismissing the action.

III. Oral Hearing Requirement

Mr. Greene alleges that the District Court violated his due process rights by failing to hold an oral hearing rather than dismissing his complaint on the pleadings alone. However, as we have previously noted, "[e]very circuit to consider the issue has determined that the 'hearing' requirements of Rule 12 and Rule 56 do not mean that an oral hearing is necessary, but only require that a party be given the opportunity to present its views to the court." *Greene v. WCI Holdings*, 136 F.3d 313, 316 (2d Cir. 1998) (per curiam). Because Mr. Greene was clearly provided with ample opportunity to state his arguments, the District Court properly dismissed his complaint without an oral hearing.

IV. Judge's Recusal

To the extent that Mr. Greene alleges, for the first time in the action, that Judge Stein should have recused himself from the case based upon his former affiliation with a firm that represented Mr. Greene's adversary in a different case, Mr. Greene's argument may not be considered for the first time on appeal. *See Thomas E. Hoar, Inc. v. Sara Lee Corp.*, 900 F.2d 522, 527 (2d Cir. 1990) (declining to consider claims that were not presented below unless "necessary to avoid manifest injustice"). In any event, his argument lacks merit. Title 28 U.S.C. § 455 requires a judge to disqualify himself where, *inter alia*, "his impartiality might reasonably be questioned," "he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding," or "in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter." 28 U.S.C. § 455(a), (b)(1)-(2). The fact that Judge Stein practiced law with an attorney that represented Mr. Greene's adversary in a different proceeding does not require Judge Stein's recusal in this case.

The judgment of the District Court is AFFIRMED.

FOR THE COURT:

CAROLYN CLARK CAMPBELL, Clerk

/s/ Lucille Carr 3/18/99

By: Date

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 18th day of March, one thousand nine hundred and ninety-nine.

PRESENT:

HON. RICHARD J. CARDAMONE,
HON. CHESTER J. STRAUB,
HON. DAMON J. KEITH.*
Circuit Judges.

CLIFF GREENE,

Plaintiff-Appellant,

SUMMARY ORDER
No. 98-7571
(Filed Mar. 18, 1999)

v.

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* The Honorable Damon J. Keith, of the United States Court of Appeals for the Sixth Circuit, sitting by designation.

BERGER & MONTAGUE, P.C.; DAVID BERGER, Esq., Senior Partner; LAWRENCE J. LEDERER, Esq., Chief of Staff to David Berger, Esq.,

Defendants-Appellees.

Appearing for Appellant:	CLIFF GREENE, *Pro Se*, Brooklyn, N.Y.
Appearing for Appellee:	BRENDA F. SZYDLO, James J. Sabella, Cathleen M. Tiernan, Brown & Wood, New York, N.Y.

Appeal from a judgment entered in the United States District Court for the Southern District of New York (Sidney H. Stein, *Judge*).

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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CLIFF GREENE,

Plaintiff,

- against -

BERGER & MONTAGUE, P.C., DAVID BERGER, and LAWRENCE B. LEDERER,

Defendants.

----------X

95 CV 4897 (SJ)

MEMORANDUM AND ORDER

APPEARANCES:

CLIFF GREENE
1333 President Street
Brooklyn, New York 11213
Plaintiff *Pro Se*

BROWN & WOOD
One World Trade Center
New York, New York 10048
By: Andrew J. Maloney, Esq.
Counsel for Defendants

JOHNSON, District Judge:

Pending before this Court is Defendants' motion to transfer venue to the United States District Court for the Southern District of New York ("Southern District"). For the reasons stated herein, Defendants' motion is granted.

BACKGROUND

Cliff Greene ("Plaintiff" or "Greene"), appearing *pro se*, filed this action against the law firm Berger & Montague, P.C., and two of its members, David Berger and Lawrence Lederer ("Defendants"). Plaintiff alleges that he requested Defendants' representation in order to pursue his federal securities claims against Drexel Burnham Lambert Group, Inc. ("Drexel") in connection with losses he suffered on 160,000 Wickes Company warrants and 3,000 shares of C.O.M.B. Company common stock. Although the parties agree that Defendants told Plaintiff that they could not represent him individually because they already represented clients and another class of securities-related claimants whose claims directly competed with Plaintiff's, Mr. Greene claims that Defendants actually refused to represent him because he is an African-American.

Defendants have moved to transfer venue pursuant to 28 U.S.C. §§ 1404 and 1406 to the Southern District of New York.

DISCUSSION

Defendants argue, in part, that venue is improper in this district.[1] Jurisdiction in this case is alleged on the

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[1] Defendants also argue that Plaintiff is attempting to collaterally attack the adverse disposition of his claims in the Drexel bankruptcy litigation currently before Judge Pollack, or that venue should be transferred in the interests of justice pursuant to 28 U.S.C. § 1404(a). Because this Court finds that venue is improper in this district, Defendants' additional two arguments need not be addressed.

basis of both 28 U.S.C. §§ 1331 and 1332, and therefore the forum in which this action may be appropriately brought is governed by 28 U.S.C. § 1391(b). Plaintiff incorrectly argues that venue is determined by 28 U.S.C. § 1391(c). That section, however, does not itself provide an independent basis for venue. Rather, it simply defines where a corporate defendant is deemed to "reside" for the purposes of §§ 1391(a) or 1391(b). To determine proper venue in this action, therefore, this Court turns to 28 U.S.C. § 1391(b), which provides:

> A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of the property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

Defendants in this case reside in different states, *see* Berger Jan. 18th Aff. ¶ 2, Lederer Jan. 18th Aff. ¶ 2, and a substantial part of the events giving rise to this claim, *i.e.*, Defendants' failure to represent Plaintiff in the Southern District Drexel proceedings, occurred in the Southern District of New York. Subsections (1) and (3) are therefore inapplicable to determine the venue of this action. As Defendants appropriately note, the only events that are related to this District are the facts that Plaintiff resides here and that he received Drexel-related correspondence

here.[2] Because this Court finds that a substantial part of the events giving rise to Plaintiff's claims occurred in the Southern District, and *not* in the Eastern District of New York, Defendants' motion to transfer venue is granted pursuant to 28 U.S.C. § 1406(a).

CONCLUSION

For the reasons stated herein, Defendants' motion to transfer venue to the Southern District of New York is granted.

SO ORDERED.

Dated: November 12, 1996
Brooklyn, New York

/s/ Sterling Johnson
U.S.D.J.

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[2] Plaintiff's complaint alleges that conversations regarding Defendants' possible representation of him took place in Defendants' offices in Philadelphia, Pennsylvania. Complaint at 5-7.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the twenty-fourth day of January one thousand nine hundred and ninety-seven,

Cliff Greene, Plaintiff-Appellant, v. Berger & Montague, P.C., *et al.*, Defendants-Appellees.	96-9620 (Filed Jan. 24, 1997)

A motion having been made herein by appellees to dismiss, upon consideration thereof, it is ordered that the motion be and it hereby is granted. An order transferring venue between districts pursuant to 28 U.S.C. § 1406(a) is not a final order under 28 U.S.C. § 1291 and does not fall within the collateral order doctrine. *See Michael v. INS*, 48 F.3d 657, 661 (2d Cir. 1995); *United States Tour Operations*

Ass'n v. Trans World Airlines, Inc., 556 F.2d 126, 129 (2d Cir. 1977).

/s/ Illegible

/s/ Illegible
Circuit Judges

/s/ John Illegible
District Judge

ALK DGJ Gleeson

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the twenty-fifth day of March one thousand nine hundred and ninety-seven.

Greene

Appellant,

Dkt No: 96-9620

(Filed Mar. 25, 1997)

v

Berger & Montague PC

Appellee.

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellant Cliff Greene.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
GEORGE LANGE III, Clerk
By:

/s/ Arthur M. Heller
Arthur M. Heller
Administrative Attorney

p o. ccc inbancdn _frm

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CLIFF GREENE, Plaintiff, -against- BERGER & MONTAGUE, P.C., DAVID BERGER, LAWRENCE J. LEDERER, Defendants.	96 Civ. 9339 (SHS) OPINION AND ORDER

SIDNEY H. STEIN, U.S. District Judge.

Cliff Greene, appearing *pro se*, filed this action against the law firm of Berger & Montague, P.C., and two of its attorneys, David Berger and Lawrence J. Lederer. Greene alleges that he requested that defendants represent him in his federal securities claims against Drexel Burnham Lambert Group, Inc. ("Drexel") in connection with losses he suffered on 160,000 Wickes Company warrants and 3,000 shares of C.O.M.B. Company common stock. Plaintiff acknowledges that defendants told him they could not represent him because they already represented a class of claimants whose claims competed with plaintiff's (*see* Compl. ¶¶ 23-24; Exh. F), but alleges that defendants' actual reason for refusing to represent him was that he is African-American. Plaintiff has brought claims pursuant to a variety of constitutional, statutory, and common law theories, and defendants have now moved pursuant to Fed. R. Civ. P. 12(c) for judgment on

the pleadings. For the reasons that follow, defendants' motion is granted.

BACKGROUND

The facts as set forth in this Opinion and Order are drawn strictly from plaintiff's complaint – as is appropriate on consideration of a Rule 12(c) motion for judgment on the pleadings (*see Bloor v. Carro, Spanbock, Londin, Rodman & Fass*, 754 F.2d 57, 61 (2d Cir. 1985)) – as well as from certain documents plaintiff has attached to his complaint. *See Brass v. American Film Technologies, Inc.*, 987 F.2d 142, 150 (2d Cir. 1993) (motion to dismiss); *Greene v. WCI Holdings Corp.*, 956 F. Supp. 509, 511 (S.D.N.Y. 1997).

The complaint arises out of alleged market manipulation and other wrongdoing by Drexel in connection with a number of securities, including those purchased by plaintiff. After Drexel filed for bankruptcy, *see In re Drexel Burnham Lambert Group, Inc., et al.*, 90 Civ. 6554 (MP), Chapter 11 Case No. 90 B. 10421 (FGC) (S.D.N.Y.), various lawsuits against it were consolidated in the Southern District of New York before Judge Milton Pollack. Judge Pollack certified a class of all securities-related claimants, with defendant Berger & Montague P.C. as one of four class co-counsel. (Compl. ¶ 18). A settlement fund was established, and ultimately a class settlement was judicially approved. *In re Drexel Burnham Lambert Group, Inc.*, 130 B.R. 910 (S.D.N.Y. Bankr. 1991), *aff'd*, 960 F.2d 285 (2d Cir. 1992).

In late June of 1992 – after Berger & Montague had been appointed class co-counsel and the settlement had been approved – plaintiff visited the offices of Berger &

Montague to discuss hiring the firm to represent him in bringing separate claims against Drexel. (Compl. ¶ 19). Prior to coming to defendants' offices, plaintiff had telephoned the firm and "was lead to believe that he would be accepted as a client of the firm." (*Id.*). However, upon arrival, plaintiff claims, "when it became obvious that plaintiff was black, an African American, it was a different story." (*Id.*). Lawrence Lederer reviewed plaintiff's submitted proof of claim and "decided that it would be unethical . . . and a conflict of interest for Berger & Montague, P.C., to represent plaintiff as a client[ ] in the [Drexel] matter . . . [b]ecause[ ] of the positions the senior partner in the firm, David Berger, Esq., held on the court appointed subclass B executive committee." (Compl. ¶¶ 22, 23). Plaintiff received a letter signed by Berger on June 29, 1992, which confirmed that "it would be inappropriate for [defendants] to represent [him] as requested." (Compl. ¶ 23; Exh. F).

Although the committee that Judge Pollack appointed to evaluate claims concluded that plaintiff's claim lacked merit and should receive a $0 valuation (Compl. ¶ 29; Exh. I-(b); Exh. J, at 25), it nonetheless offered him $20,000 in settlement, which Green refused and instead pursued objections to the $0 valuation before Judge Pollack. (Compl. Exh. I-(b); Compl. Exh. J, at 25). After the District Court overruled his objections (Compl. Exh. J), Greene appealed that ruling to the Second Circuit, which dismissed the appeal *sua sponte* on October 27, 1994. Plaintiff thereafter unsuccessfully petitioned for a writ of certiorari. *Greene v. Drexel Burnham Lambert Group, Inc.*, 514 U.S. 1012, 115 S. Ct. 1350, 131 L. Ed. 2d 210 (1995).

In November 1995, plaintiff commenced this action in the Eastern District of New York, alleging that defendants' refusal to represent him amounted to discrimination on the basis of race, ethnicity and color. Plaintiff seeks to recover the same monetary relief he unsuccessfully sought in the Drexel bankruptcy proceedings. (Compl. ¶ 31; Compl. Exh. J, at 25). By opinion and order dated November 12, 1996, Judge Sterling Johnson of the Eastern District granted defendants' motion to transfer venue to the Southern District of New York. Plaintiff attempted to appeal that determination to the Second Circuit, which dismissed the appeal in January of 1997, and subsequently denied plaintiff's motion for rehearing.

DISCUSSION

Plaintiff's complaint contains four claims, brought pursuant to (1) 42 U.S.C. §§ 1981 and 1983 (Compl. ¶¶ 34-49); (2) common law fraud (Compl. ¶¶ 50-56); (3) the New York Bill of Rights (Compl. ¶¶ 57-63); and (4) the Pennsylvania Declaration of Rights (¶¶ 64-74). The Court concludes that all four of plaintiff's claims must be dismissed.

I. Constitutional Claims

Plaintiff's first claim for relief, premised on the alleged discrimination by defendants in refusing to represent plaintiff, who is African-American, even though they represented "members of the white race" in the Drexel bankruptcy proceedings, appears to rely on the 14th Amendment to the United States Constitution (Compl. ¶¶ 40-41) and on 42 U.S.C. § 1983 (Compl. ¶¶ 38, 43).

However, the rights secured by the Fourteenth Amendment "are protected only against infringements by governments." *Flagg Bros. Inc. v. Brooks*, 436 U.S. 149, 156, 98 S. Ct. 1729, 1733, 56 L. Ed. 2d 185 (1978) (citations omitted). Thus, a plaintiff making a claim pursuant to the Fourteenth Amendment, or pursuant to 42 U.S.C. § 1983, must allege facts showing that state action deprived that plaintiff of a protected interest. *See Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349, 95 S. Ct. 449, 453, 42 L. Ed. 2d 477 (1974) (Fourteenth Amendment); *West v. Atkins*, 487 U.S. 42, 48, 108 S. Ct. 2250, 2255, 101 L. Ed. 2d 40 (1988) (Section 1983) (citations omitted); *Silverman v. The Newspaper and Mail Deliverers' Union of New York and Vicinity*, No. 97 Civ. 0040 (SHS), 1997 U.S. Dist. LEXIS 17732, *3-4 (S.D.N.Y. Nov. 10, 1997) (Section 1983).

Plaintiff's third claim for relief is that he was denied equal protection of the laws pursuant to Article I, § 11 of the New York Constitution. However, that section, too, has been interpreted to include a state action requirement. *See Rohan v. American Bar Ass'n*, No. 93 Civ. 1338 (SJ), 1995 WL 347035, at *8-9 (E.D.N.Y. May 31, 1995), *aff'd*, 100 F.3d 945 (2d Cir. 1996); *Holy Spirit Ass'n for Unification of World Christianity v. New York State Congress of Parents and Teachers, Inc.*, 95 Misc.2d 548, 552, 408 N.Y.S.2d 261, 265 (Sup.Ct.N.Y.Co.1978).

Finally, in his fourth claim for relief, plaintiff pleads a claim pursuant to Article I, § 26 of the Declaration of Rights of the Commonwealth of Pennsylvania. (Compl. ¶ 63). That section, by its express terms, only prohibits discrimination by the Commonwealth of Pennsylvania or any of its political subdivisions.

Though plaintiff includes the conclusory assertion that defendants acted under color of state law (see Compl. ¶¶ 61, 73), he has made absolutely no showing that any of the defendants in this case are state actors, that they acted under color of law, or that their conduct could be fairly attributable to the state. Moreover, it is well-established that private attorneys, despite their status as officers of the court, do not act under color of state law for purposes of civil rights laws such as 42 U.S.C. § 1983 (*see Sturm v. Schrank*, 43 B.R. 755, 758 (S.D.N.Y.1984) (citations omitted)), even where the state retains the attorney to represent a client. *See Polk County v. Dodson*, 454 U.S. 312, 317-19, 102 S. Ct. 445, 449-50, 70 L. Ed. 2d 509 (1981). Accordingly, plaintiff's equal protection and civil rights claims brought pursuant to the Fourteenth Amendment, 42 U.S.C. § 1983, and the New York and Pennsylvania Constitutions are dismissed.[1]

II. Statutory Civil Rights Claims

In addition to attempting to assert a claim pursuant to 42 U.S.C. § 1983, plaintiff also brings a claim pursuant to 42 U.S.C. § 1981, alleging that defendants' refusal to contract with him amounted to "an invidious form of

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[1] Because plaintiff also refers to 18 U.S.C. § 242 in his complaint (Compl. ¶ 61), it should be noted that this provision – the criminal analogue of 42 U.S.C. § 1983 – does not provide a private right of action. *See Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502, 511 (2d Cir. 1994). Accordingly, any claim by plaintiff pursuant to 18 U.S.C. § 242 would also be dismissed on the pleadings.

racial discrimination." (Compl. ¶ 35). This claim must also be dismissed.

Pursuant to 42 U.S.C. § 1988, the statute of limitations for claims brought pursuant to §§ 1981 and 1983 is governed by state law. Courts presented with §§ 1981 and 1983 claims must look to the statute of limitations governing the most closely analogous state causes of action. *See Owens v. Okure*, 488 U.S. 235, 239, 109 S. Ct. 573, 576, 102 L. Ed. 2d 594 (1989). In New York, courts repeatedly hold that such claims are subject to the three-year limitations period applied to general personal injury claims, which is set forth in CPLR § 214(5). *See e.g., Rodriguez v. Chandler*, 641 F. Supp. 1292, 1296-97 (S.D.N.Y. 1986); *Saunders v. State of New York*, 629 F. Supp. 1067, 1069 (N.D.N.Y. 1986) (Section 1983); *Butts v. City of New York Dep't of Housing Preservation & Development*, 990 F.2d 1397, 1412 (2d Cir. 1993) (Section 1981); *Zuccaro v. Theofan*, No. 95-7487, 1995 U.S. App. LEXIS 39917, at *3 (2d Cir. Dec. 27, 1995) (Section 1983). Thus, plaintiff's §§ 1981 and 1983 claims are subject to a three-year statute of limitations.

Plaintiff came to defendants' office to request representation in late June 1992, and was informed in writing on June 29, 1992 that Berger & Montague would not represent him in the Drexel proceedings. (Compl. ¶¶ 19, 24). Since the statute of limitations for a claim pursuant to §§ 1981 and 1983 runs "from the date of the alleged discriminatory conduct," *Clark v. Times Square Stores Corp.*, 469 F. Supp. 654, 655-56 (S.D.N.Y.1979), plaintiff's discrimination claim accrued no later than June 29, 1992. Thus, to make his claim timely, plaintiff would have had to – but did not – institute this action prior to June 29, 1995. Because plaintiff did not file his complaint until

November 29, 1995, his claims pursuant to §§ 1981 and 1983 must be dismissed as time-barred.

III. Common Law Fraud Claims

Relying on the same allegations that support his discrimination claims, plaintiff brought a second claim for relief pursuant to a state common law fraud theory. (Compl. ¶¶ 50-56). That claim fails for two independent reasons.

First, plaintiff has not pled fraud with the requisite particularity. He has not "allege[d] facts that give rise to a strong inference of fraudulent intent," *Acito v. Imcera Group, Inc.*, 47 F.3d 47, 52 (2d Cir. 1995), and thus, the strictures of Fed. R. Civ. P. 9(b) have not been met. *See* Fed. R. Civ. P. 9(b); *see also Roberts v. Francis*, 128 F.3d 647, 650 (8th Cir. 1997); *Aeronca, Inc. v. Gorin*, 561 F. Supp. 370, 375 (S.D.N.Y. 1983).

Second, and more importantly, plaintiff has thoroughly failed to plead the elements of common law fraud. The elements of a common law fraud claim in New York are: (1) a material representation; (2) which is false; (3) an intent to defraud thereby; (4) reasonable reliance on the representation; (5) which caused damage to the plaintiff. *See Turtur v. Rothchild Registry Int'l, Inc.*, 26 F.3d 304, 310 (2d Cir. 1994). In his complaint, plaintiff makes the conclusory allegation that "[d]efendants[']' [a]cts and [s]tatements to plaintiff described herein were false and knowing that they also failed to state material facts necessary to make the statements made, in light of the circumstances under which they were made, not misleading." (Compl. ¶ 53). However, plaintiff has failed to identify

any statements made to him that were, in fact, false. Moreover, he has not included any allegation that such false statements or omissions were made with fraudulent intent, nor has he alleged that he reasonably relied to his detriment on the allegedly false statements or material omissions. The simple fact of the matter is that allegations that an attorney informing a prospective client that he cannot represent that individual due to a conflict does not state a claim for fraud.[2]

CONCLUSION

Defendants' motion is granted and the Clerk of Court is directed to enter judgment on the pleadings in defendants' favor.

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[2] Because plaintiff also refers to various federal securities law provisions, including section 10(b) of the Securities Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 (Compl. ¶¶ 48, 49), he may be attempting to assert a federal securities claim. However, he has failed to do so on these facts. First, plaintiff has not pled that any alleged fraud by defendants occurred "in connection with the purchase or sale of any security," as is required when making a section 10(b) claim. *See Citizens & Southern Security Corp.*, 733 F. Supp. 655, 666 (S.D.N.Y.1990). Second, any such claim would be time-barred since it was brought more than three years from the date of the alleged violation. *See Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 111 S. Ct. 2773, 115 L. Ed. 2d 321 (1991). Third, to make such a claim, plaintiff would have to comply with the requirements of Fed. R. Civ. P. 9(b), which, as noted above, he has failed to do.

Dated: New York, New York
March 4, 1998

SO ORDERED:

/s/ Sidney H. Stein
Sidney H. Stein, U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---------- X

CLIFF GREENE,

Plaintiff,

-against-

BERGER & MONTAGUE, P.C., DAVID BERGER, LAWRENCE J. LEDERER,

Defendants.

---------- X

96 CIVIL 9339 (SHS)

JUDGMENT

(Filed March 9, 1998)

Defendants having moved for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c), and the said motion having come before the Honorable Sidney H. Stein, United States District Judge, and the Court thereafter, on March 4, 1998, having rendered its Opinion (80216) and Order granting defendants' motion for judgment on the pleadings in its favor, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons set forth in the Court's Opinion (80216) and Order dated March 4, 1998, defendants' motion for judgment on the pleadings is granted in its favor.

DATED: New York, New York
March 9, 1998

JAMES M. PARKISON

Clerk of Court

BY:

/s/ Illegible
Deputy Clerk

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

KAREN GREVE MILTON
ACTING CLERK

At a stated term of the United States Court of Appeals for the Second Circuit held at the United States Courthouse, Foley Square, in the City of New York, on the 28th day of July one thousand nine hundred and ninety-nine.

Greene

Plaintiff-Appellant,

v

Merger & Montague PC

Defendants-Appellant,

Dkt No: 98-7571

(Filed July 28, 1999)

A petition for a panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Cliff Greene.

> Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular

active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

KAREN GREVE MILTON,
Acting Clerk

By: /s/ Beth J. Meador
Beth J. Meador,
Administrative Attorney

APPENDIX H

AMENDMENT XIV TO UNITED STATES CONSTITUTION CITIZENSHIP RIGHTS NOT TO BE ABRIDGED

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX I

COMMENTARY ON 1988 AND 1990 REVISIONS OF SECTION 1391

BY DAVID D. SIEGEL

Section 1391 is big business in the federal courts. It's the basic venue statute, determining what district or districts an action may be brought in. Extensive changes were made in the section in 1988 and 1990, affecting subdivisions (a),(b),(c), and (e).

Subdivision (c), the provision governing the venue of actions against corporations, was amended in 1988 in the judicial improvements and access to justice act (Pub.L. 100-702). The aim was apparently to restrict the plaintiffs venue choices somewhat, but in some cases it may have the opposite effect.

Plaintiff respectfully requests that the court keep in mind that defendant Berger & Montague, P.C., is a professional corporation.

28 U.S.C. Sec. 1391 (c), for purposes of venue under Chapter 87, a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced. In a state which has more than one judicial district and in which a defendant that is a corporation is subject to personal jurisdiction at the time an action is commenced, such corporation shall be deemed to reside in any district in that state within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate state, and, if there is no such district, the corporation shall be deemed to reside in the

district within which it has the most significant contacts, *see* pages 1 and 2 of the complaint at Exhibit -D- attached thereto. Berger & Montague, P.C., is licensed to do business in the state of New York, and does same, under the authority of state laws or under the color of state laws. Therefore, it is an actor of the state. And, further, as an actor of the state, it sets into motion 42 U.S.C. Sec. 1983, which in turns, triggers 14. Amend. equal protection clause.

Defendant David Berger, Esq. CEO of Berger & Montague, P.C., was licensed to practice law in the state of New York, at the commencing of action in this matter. Therefore, he too is an actor of the state of New York. and, it was he who as CEO of Berger & Montague, P.C., that brought about the deprivation of plaintiff to make contract pursuant to 42 U.S.C. Sec. 1981.

David Berger, Esq. CEO of Berger & Montague P.C., must be considered a resident of Eastern District of New York, the same as its corporation Berger & Montague, P.C., as CEO, you can't run away to Florida and claim it as a resident simply because the going gets tough. The running of the corporation is the responsibility of the chief executive officer. Therefore, David Berger, Esq., CEO of Berger & Montague, P.C., must be held liable in this matter.

David Berger, Esq. by virtue of his public position, as co-chairman of the court appointed subclass B executive committee, and serving in an advisory and supervisory position, as a professional further makes him an actor of the state of New York, *see* e.g., *Tower v. Glover*, 467 U.S.

914, 104 S. Ct. 2820, 81 L. Ed. 2d 758 (1984) (State Public Defenders).

Since venue lies in this district pursuant to 28 U.S.C. Sec. 1391(c) plaintiff submits to the court subdivision (c) background of 1988 amendment.

SUBDIVISION (c)

BACKGROUND OF 1988 AMENDMENT

The old subdivision (c) allowed venue in an action against a corporate defendant to be laid in the corporation's district of incorporation or in any district in which it was licensed to do business or actually doing business. The view on which congress acted in amending the subdivision was apparently based on the "licensed to do business" segment of the old statute; since a corporation that duly licenses itself under state law is authorized to do business anywhere in the state, the "licensing" standard would, in a state with several districts, X, Y, and Z. Make any district in that state a proper venue in an action against a corporate defendant even if all of the corporations activities were in X district alone. It was this alternative that Congress, citing a judicial conference recommendation, sought to eliminate with the 1988 amendment. (See representative Kastenmeier's report in behalf of the house judiciary committee (Rept. 100-889, August 26, 1988, Page 70). In making the change, however congress recast the provision in its entirety, perhaps producing some open questions in the course of doing so.

Turning now to the new subdivision (c) and its fresh approach, application to defendant corporation. See below;

APPLICATION TO DEFENDANT CORPORATION

Turning attention now to the residence of the corporate defendant to which subdivision (c) is exclusively addressed, we assume through all of the ensuing discussion that the action is brought against a corporation.

It should be noted – as a preliminary that the subdivision (c) *test of* a corporate defendant's residence applies only when the plaintiff has opted to lay venue in the defendant's district of residence, which the plaintiff can do either in a diversity case under subdivision (a) of section 1391 or in any other kind of case under subdivision (b).

Subdivision (c) now provides that the corporation is to be deemed a resident of any judicial district in which "it is subject to personal jurisdiction at the time the action is commenced". This means that anything that would make the corporation amenable to jurisdiction in that district, or permit extraterritorial service of the court's summons under any of several well-known tests would ipso facto make that district a proper venue as well.

The corporate "doing business" test is one such test. A showing that the corporation is regularly doing business in the district subjects it to the personal jurisdiction of the courts there and hence makes that district a proper venue in an action against the corporation. (See commentary C4-28 on Rule 4 of the federal rules of civil procedure in the 28 U.S.C.A. set.) That was of course a proper venue under the prior statute as well. So was the district in which the defendant was incorporated. And so was any district in which the defendant was licensed to do business even though it was neither incorporated nor

actually doing business there. All of those things happen also to be bases for holding the defendant amenable to personal jurisdiction so it would appear at this juncture that just about all of the prior statutes venue bases subsist under the present one (subject to the restriction set forth in the second sentence of subdivision (c), discussed under the caption "venue if state has several districts").

But the present statute goes further, also authorizing venue in any district in which a state longarm statute would be applicable to justify extra state service. Longarm statutes proliferate under state law today, and all of these are adopted by Rule 4(e) of the federal rules of civil procedure for use in all federal actions and without regard to the basis on which subject matter jurisdiction rest in the action, that is, they apply not only in diversity cases, but also in federal question cases, admiralty cases, cases in which the United States is a party, etc. (see commentary C4-27 on Rule 4.)

Whenever a state longarm statute applies, enabling the plaintiff to secure personal jurisdiction of the corporate defendant regardless of where the defendant has been served with process a district in that state now qualifies ipso facto as proper venue as against that defendant. That was not universally true under the venue standards of the old subdivision (c). Some courts did assimilate the two things out holding venue present wherever longarm jurisdiction was, but a number of others, including some at circuit level, would not go along, to them the "doing business" test for venue was more demanding than the softer test that had evolved under longarm statutes addressed to jurisdiction, and in that light venue might well be lacking even if jurisdiction

offered by a state longarm statute was present. See Maybelline Co. v. Noxell Corp., 813 F.2d 901 (8th Cir. 1987), one of the courts refusing to assimilate the two tests; it collates the cases both ways.

Under the first sentence of the amended subdivision (c), the Maybelline line of cases is overruled, and proper jurisdiction under a state longarm statute does indeed mean proper venue under the federal corporate-venue statute. There is an overlap in this regard here between subdivision (c), governing corporations, and clause (2) in subdivisions (a) and (b), governing parties generally. The latter two subdivisions were amended two years after the amendment of súbdivision (c) under discussion here and there was no coordination of them with the earlier amendment of subdivision (c). While subdivision (c) would seem to be preemptive of venue in actions against a corporation, the purpose of the subdivision (c) amendment was to expand venue opportunities in actions against corporations. In that light, if a case should arise in which venue is technically missed under subdivision (c) the case just fell through the cracks – but would be available against the corporation under subdivision (a) or (b), it would not be inconsistent with congressional intent to uphold the venue against the corporation. One case that comes to mind to illustrate this possibility is where the action involves specific property and is brought in rem, with venue laid in the district of the property under clause (2) of either subdivision (a) or subdivision (b). The district proper now under clause (2) of one of those subdivisions because it is the sites of the property, should be a sustainable venue against a corporation, too, in this

in rem case, even if there is no basis for personal jurisdiction against the corporation under subdivision (c).

ARGUMENT

FOR SAKE OF ARGUMENT

Pursuant to judge Johnson's memorandum and order dated November 12, 1996 page 2 of same, defendant's move to transfer venue pursuant to 28 U.S.C., Sections 1404 and 1406, to SDNY. Page 4, of Judge Johnson's memo. And order, the judge granted defendants' motion to transfer venue pursuant to Sec. 1406(a) but, remained silent on 1404(a), upon which plaintiff relied, for denial of transfer to venue to SDNY. Plaintiff contends that Judge Johnson, should have ruled in plaintiff's favor – see Exhibit -A- of plaintiff's affidavit in opposition of motion to dismiss appeal – re: Landmark Land Co. Inc., v. Office of Thrift Supervision, plaintiff's case against the defendants arises out of the fact that defendants deprived plaintiff of his rights to make contract pursuant to 42 U.S.C., Sec. 1981, and, not as defendants argued and the lower court ruled that the case arose out of Drexel Burnham Lambert, Inc. ("Drexel"), bankruptcy case. And plaintiff's claims filed there-in. Nothing is further from the truth, plaintiffs complaint against defendant has to do with civil rights laws violations, 42 U.S.C., Sec. 1981, Sec, 1983, and 14. amend. Equal protection clause. Whereas, Drexel's bankruptcy case has to do with securities laws violations, Rules 10b, 10b-5, Sections 7 and 17 (a)(1) of the Exchange Act of 1934, and on and on.

Therefore, since plaintiff's complaint or case is not directly involved in Drexel's bankruptcy case; venue can

not be transferred from EDNY to SDNY pursuant to Sec. 1404(a) *see* Landmark Land Co. Inc. et al. v. Office of Thrift Supervision. Same, at Exhibit -A- of plaintiff's affidavit in opposition of motion to dismiss appeal. Re: Docket No. 96-9620.

IN RE: RICHARD W & CORINE B. LAZARO,

DEBTORS

(CITE, AS: 128 B. R. 168)

(4) Bankruptcy key 2082, 51K2082, "statute providing that if case is brought in wrong venue the district court shall dismiss, or in interest of justice, transfer such case to any district in which it could have been brought, *does not govern venue matters in bankruptcy cases. See: 28 U.S.C., Sec. 1406(a). (Note 133)*

Petitioner-Appellant, contends that EDNY is proper venue, pursuant to New York State Longarm Statute. Same, is presently a part of Rule 4 of Fed. R. Civ. P., therefore, is indeed the federal corporate-venue statute. See pages 6 and 7 of plaintiff's affidavit in opposition of motion to dismiss appeal. Docket No. 96-9620

5. Further reason for consideration on granting the writ by all the justices of this court, the misrepresentation of a material fact by U.S.D.C., S.D.N.Y. trial Judge, Sidney H. Stein – see page two (2) of Judge Stein's opinion and order dated March 4, 1998, 96 Civ. 9339 (SHS), re: "plaintiff visited the offices of Berger & Montague to discuss hiring the firm to represent him in bringing separate claims against Drexel. (Compl. Par. 19)" See Par. 3, page

two (2) Judge Stein's order below, then, compare plaintiff's Par. 19, of the complaint that would follow – Judge Stein's Par. 19.

QUOTE PAGE TWO

JUDGE STEIN'S ORDER

"In late June of 1992 – after Berger & Montague had been appointed class co-counsel and the settlement had been approved – plaintiff visited the offices of Berger & Montague to discuss hiring the firm to represent him in bringing separate claims against Drexel. (Compl. ¶ 19). Prior to coming to defendants' offices, plaintiff had telephoned the firm and "was lead to believe that he would be accepted as a client of the firm." (Id.). However, upon arrival, plaintiff claims, "when it became obvious that plaintiff was black, an African American, it was a different story." (Id.). Lawrence Lederer reviewed plaintiff's submitted proof of claim and "decided that it would be unethical . . . and a conflict of interest for Berger & Montague, P.C., to represent plaintiff as a client in the Drexel matter because of the positions the senior partner in the firm, David Berger, Esq., held on the court appointed subclass executive committee." (Compl. ¶¶ 22,23). See attached order for further affirm.

PLAINTIFF – APPELLANT'S

PAR. 19, OF COMPLAINT

19. In a telephone conversation with Berger & Montague, P.C., Law Offices, just prior to an in person visit to the law offices, in Philadelphia, PA on or about June 24, 1992, plaintiff, was lead to believe that he would be

accepted as a client of the firm, and its representation in an effort to recover plaintiff's losses suffered in the Drexel Burnham Lambert's, Inc., (Drexel) Michael Milken, Boesky and other wrongdoing, as it relates to Drexel's bankruptcy case. However, upon plaintiff's arrival at the law offices, when it became obvious that plaintiff was black, an African American, it was a different story.

In further support of plaintiff – appellant's cause of action against defendants, see court order, Chapter 11 Case No. 90 B. 10421 (FGC) (S.D.N.Y.), dated New York, New York, May 10, 1991, see Exhibit -B- of the order, for plaintiff's name and claim #11685 listed with defendant's clients. Plaintiff acted as pro se, defendants denied plaintiff legal representation –

PREJUDICIAL ERROR

COMMITTED BY STERLING JOHNSON, JR.,

UNITED STATES DISTRICT COURT JUDGE,

EASTERN DISTRICT OF NEW YORK (BROOKLYN)

The lower court, Judge Sterling Johnson, presiding, committed prejudicial error, when ruling on pages 2 and 3, of his memorandum and order dated November 12, 1996, same granting defendants-appellees' motion to transfer venue to SDNY. Judge Johnson "ruled that the forum in which this action may be appropriately brought is governed by 28 U.S.C. Sec. 1391(b). And, that plaintiff-appellant, *incorrectly* argue that venue is determined by 28 U.S.C. Sec. 1391 (c). Please let the court records show, that it was Judge Johnson, who *incorrectly* relied upon 28

U.S.C. Sec. 1391(b) in his rulings, granting defendants-appellees' motion to transfer venue to southern district of New York (S.D.N.Y.) and, not plaintiff-appellant – repeat not plaintiff-appellant. Plaintiff-appellant, *correctly* relied upon 1391(c), in defining corporate residence for Berger & Montague, P.C. as being located in Eastern district of new York, (Brooklyn).